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IN THE

Supreme Court of the United States

No. 71-84

LEE HILL, JOHNNY CLARK, FLOYD NORTLEET, NORMAN WILSON, THOMAS KELLY, PAUL LEONARD, LAWRENCE Y. LINGARD, JERRY B. WILLIAMS, FREDERICK T. WIMS, FRANCIS ROLLS, THOMAS E. BELL, EDWARD RAY, MARTIN FRANCKEN, ARNOLD WALKER, ALVIN RUE, ALVIN G. BAILEY, ROBERT WILLIAMS AND CHARLES A. BURNETT,

Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

ANSWER TO PETITION FOR WRIT OF CERTIORARI AND BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

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Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

ANSWER TO PETITION FOR WRIT OF CERTIORARI AND BRIEF FOR RESPONDENT IN OPPOSITION

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Respondent, the Commonwealth of Pennsylvania, by Robert W. Duggan, District Attorney of Allegheny County, Pennsylvania, and J. Kent Culley, Assistant District Attorney, makes answer to the Petition for Writ of Certiorari to the Supreme Court of the United States.

Opinions Below

The opinion of the Court of Appeals is reported at 439 F. 2d 1016 (3rd Cir. 1971). The orders of the District Court for the Western District of Pennsylvania, remanding the

causes of action to the Allegheny County Court of Common Pleas are reported at 315 F. Supp. 215 (WD. Pa. 1970), for Petitioners Leonard, Lingard, Williams, Wims, Rolls, Bell; 313 F. Supp. 1159 (W. D. Pa. 1970) for Petitioners Hill, Clark, Norfleet, Wilson and Kelly. The opinions and orders remanding Petitioners Ray, Francken, Walker, Rue, Bailey, Williams (Robert) and Burnett to the Allegheny County Court of Common Pleas have not yet been reported. It should be noted that all opinions have been identical.

Jurisdiction

Respondent avers that your Honorable Court has jurisdiction by virtue of 28 U. S. C. § 1254 (1).

Questions Presented

I. Was the District Court correct in holding that appellants had not stated a proper case for removal under Title 28, U. S. Code § 1143 (1) and Title 42, U. S. Code §§ 1981, 1983, 2000 (d), 2000 (e)-2, (a), (c), and (d), and Title 18, U. S. Code § 245?

II. Must appellants show that the alleged denial of their equal civil rights is derived from a constitutional provision or statute of the State?

III. Is there a sufficient basis to predict with relative clarity that appellants cannot enforce their alleged affirmative federal equal civil rights in the Courts of the Commonwealth of Pennsylvania?

IV. Are petitioners entitled to an evidentiary hearing in the District Court when they have failed to state a case for removal to that court?

Statutes Involved

The pertinent part of 18 U. S. C. § 245 is as follows:

> (a)(1) Nothing in this section shall be construed as indicating an intent on the part of Congress to prevent any State, any possession or Commonwealth of the United States, or the District of Columbia, from exercising jurisdiction over any offense over which it would have jurisdiction in the absence of this section nor shall anything in this section be construed as depriving State and local law enforcement authorities responsibility for prosecuting acts that may be violations of this section and that are violations of State and local law. No prosecution of any offense described in this section shall be undertaken by the United States except upon the certification in writing of the Attorney General or the Deputy Attorney General that in his judgment a prosecution by the United States is in the public interest and necessary to secure substantial justice, which function of certification may not be delegated.

Section 1443 of 28 U. S. C. § 1443:

> "Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> (1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

Sections 1981, 1983, 2000-d, 2000 e-2 (a), (c) and (d) of 42 U. S. C.:

> "§ 1981.
>
> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit

of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
R. S. § 1977

§ 1983.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
R. S. § 1979

§ 2000e-2.

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

§ 2000e-2.

(a) It shall be an unlawful employment practice for any employer

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * *

LABOR ORGANIZATION PRACTICES

(c) It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

TRAINING PROGRAMS

(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training."

Counter-Statement of the Case.

A. The Circumstances of the Criminal Prosecution.

On August 26, 1969 the petitioners, among others, were participants in a Civil Rights demonstration in the City of Pittsburgh, Allegheny County, Pennsylvania. The demonstration was sponsored by the Black Coalition, a Pittsburgh civil rights group, and its purpose was purportedly to protest alleged discriminatory practices on the part of building

contractors and labor unions engaged in the construction of federally-assisted projects in or near the downtown area of the City of Pittsburgh. The group had obtained a parade permit from the director of Public Safety of the City of Pittsburgh and, incident thereto, the group of marchers proceeded from the downtown area to the North Side Construction site of the Three Rivers Stadium, one of the targets of the demonstrators' complaints. Prior to reaching Three Rivers Stadium, the organized march disintegrated and certain groups of the marchers, one being appellants, split away from the main group and headed toward other construction sites in the downtown area. Subsequently, petitioners were arrested near the corner of Sixth and Liberty Avenues by Pittsburgh Police and charged with Unlawful Assembly, Conspiracy To Do An Unlawful Act and Inciting to Riot. At the subsequent hearing before the magistrate, the charges of Unlawful Assembly and Conspiracy To Do An Unlawful Act were dismissed and the petitioners were indicted in the Criminal Courts of Allegheny County on the sole charge of Inciting To Riot at No. 202 December Sessions, 1969.

On May 19 and May 27, 1970 petitioners filed Petitions for Removal pursuant to Title 28, § 1443(1) of the United States Code, alleging that they would be convicted of the pending charges solely because they were attempting to enforce their federal equal civil rights and that they had been denied or cannot enforce their federal equal civil rights in the Courts of the Commonwealth of Pennsylvania.

Subsequent to the filing of petitioners' petition for removal, the District Court summoned the relevant state records and considered arguments, by both the petitioners and respondent, upon the legal sufficiency of the petition. Upon review of the petition and state records and consideration of the oral arguments and briefs of counsel and the law

applicable thereto, the District Court on June 9, July 9, July 16, and August 20, 1970, remanded the cases to the Court of Common Pleas of Allegheny County.

Starting on June 10, 1970, petitioner Hill and others filed a notice of appeal from the District Court's Order of June 9, 1970 which were filed with the Court of Appeals for the Third Circuit and all the petitions included in the Present Petition were subsequently consolidated for argument.

B. The appeal to the Court of Appeals for the Third Circuit.

On March 18, 1971, after oral argument, the Court of Appeals for the Third Circuit, affirmed the judgment of the District Court remanding the cases to the Court of Common Pleas of Allegheny County. The judgment denying a rehearing by the Court of Appeals was entered April 29, 1971.

ARGUMENT

I. Introduction.

Petitioners allege that the Court of Appeals for the Third Circuit erred in concluding that the appellants had not stated a proper case for removal under Title 28, U. S. Code, § 1443(1).

In support of this contention the Petitioners argue that the federal statutes relied upon by them in their petition for removal are "laws providing for equal Civil Rights" within the meaning of the removal statute; that it was not necessary for petitioners to demonstrate that the denial of their rights alleged under the above cited civil rights laws derived from a constitutional provision or state statutory law; that it can be readily predicted with relative clarity that the petitioners cannot enforce their affirmatively-

granted federal equal civil rights under the relied-upon federal statutes in the Courts of the Commonwealth of Pennsylvania; and that the petitioner should be entitled to an evidentiary hearing on the merits of their petition for removal.

The respondent, the Commonwealth of Pennsylvania contends that petitioners contentions are without merit, either in fact or law, and that the Court of Appeals was correct in its ultimate determination of this matter.

II. The District Court was correct in holding that appellants had not stated a proper case for removal under Title 28, U. S. Code, § 1443(1) and Title 42, U. S. Code §§ 1981, 1983, 2000(d), 2000(e)-2, (a), (c) and (d), and Title 18, U. S. Code, § 245.

Petitioners contend that the District Court erred in concluding that the allegations of their petition for removal did not properly plead a reliance upon federal statutory provisions providing for equal civil rights stated in terms of racial equality, which is essential for removal under § 1443 (1). The federal laws relied upon by the Petitioners are Title 42, § 1981, which provides that all persons in the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence and have the full and equal benefit of all laws and proceedings for the security of persons and property and be subject to like punishments, pains, penalties, taxes, licenses and exactions of every kind; Title 42, § 1983, which provides that any person who subjects or causes any citizen of the United States to the deprivation of any rights, privileges or immunities secured by the Constitution and laws shall be liable to such party injured in an action of law or suit in equity or other proceeding for redress; Title 42, §§ 2000

(d) and 2000 (e)-2, which provide for equal employment opportunities and prohibits discrimination in hiring practices, labor union membership and training problem; and Title 18 § 245, a federal criminal statute, which provides specific penalties for those who violate the rights of those engaging in certain federally protected activities enumerated in that section. The District Court, in its opinion remanding the instant case to the state court concluded that the federal laws, as above-cited and relied upon by petitioners in their petition for removal under § 1443(1), afforded no specific protection for the conduct of marching which petitioners were allegedly engaged in at the time of their arrests, this conduct being protected by the First Amendment of the U. S. Constitution. The respondent contends that the District Court's holding in this regard was correct and that the Circuit Court of Appeals erred in holding that both 42 U. S. C. A. § 1981 and 18 U. S. C. A. § 245(b) provide a basis for removal in this instance.

The removal statute, Title 28, § 1443 provides, in part:

> Any of the following civil actions or criminal prosecutions, commenced in a state court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> 1. Against any person who is denied or cannot enforce in the courts of such state a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurdisdiction thereof;

This statute has most recently been construed by the Supreme Court of the United States in the companion cases of *State of Georgia v. Rachel,* 384 U. S. 780, 86 S. Ct. 1783 (1966) and *City of Greenwood v. Peacock,* 384 U. S. 808, 86 S. Ct. 1800 (1966). The *Rachel* decision clearly set forth the strict criteria upon which removal under § 1443(1) would be granted. The Court there stated that

the petitioners must show both that the right upon which they rely is a right under any law providing for equal civil rights, and that they are denied or cannot enforce that right in the State Courts. The Court further defined this strict criteria for removal as follows:

> We conclude that the phrase "any law providing for * * * equal civil rights" must be construed to mean any law providing for specific civil rights stated in terms of racial equality. 384 U. S. at p. 792.

A summary review of the federal laws relied upon in the instant case by petitioners indicates that the activities engaged in by appellants at the time of their arrest, to-wit, marching for the purpose of gaining public sympathy and support for their contention of general discrimination in hiring practices, were not such activities specifically provided for or contemplated in the cited statutory provisions. Title 42 §§ 1981 and 1983 are general constitutional provisions dealing with traditional equal rights for equal protection under the law and the allowance of civil actions for deprivation of those rights. Although section 1981 may be in some instances, a basis for removal, as the Circuit Court of Appeals noted, neither of these provisions contains specific protection for the marching activities engaged in by petitioners or are these sufficient facts alleged in the original removal Petitions, and uncontradicted, which would constitute a violation of those specific provisions that petitioners have attempted to rely upon. Nowhere on the face of the original petitions was it alleged that petitioners were themselves applying for these jobs at Pittsburgh Construction sites. In fact, certain petitioners in this series of cases[1] were students marching in

[1] The second group of these cases, *Byron Meyers, Jr., et al. v. Commonwealth of Pennsylvania,* Nos. 19434-19442 is before the United States Court of Appeals for the Third Circuit, and was ordered submitted on briefs for determination October 21, 1971.

sympathy with the Black Coalition demonstrations the day of the arrests. There has been no showing that any of the petitioners were denied any federal equal civil rights, except the bold allegation and the distinction petitioners attempt to devise in the instant Petition concerning their intent is artificial and a strained attempt to raise a matter that heretofore they failed to raise.

To the same extent, Title 42 § 2000(d) and 2000(e)-2, provide no provisions which would protect persons marching in protest[2] that such statutory provisions are not being enforced or, on the other hand, who are urging their enforcement. Finally, Title 18 § 245, which appellants urge gives them a basis for removal and insulates them against state prosecution for the crime of inciting to riot, is absolutely without merit and furthermore it is clear that appellants have completely subverted the meaning and purpose of this law. The respondents cannot agree with the Court of Appeals that Section 245(b) in any way provide a basis for removal under section 1443(1).

The position has been taken by petitioners that somehow Title 18 § 245 of the U. S. Code is a defense to state prosecution of all the petitioners arrested August 26, 1969. All of the petitioners were indicted, subsequent to their arrests, by an Allegheny Grand Jury and charged with Inciting to Riot.[3] As stated above, Title 18 § 245 is a federal criminal statute designed to provide penalties against persons who would interfere with those who are

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[2] Compare these sections to the Public Accommodation Section of the 1964 Civil Rights Act at 42 USCA 2000(a)-2 which provides specific protection to users of public accommodations and in effect, provides insulation from state prosecution for peaceably attempting to use places of public accommodation. See also *Hamm v. City of Rock Hill*, Ark. & S. C. 1964, 85 S. Ct. 384, 379 U. S. 995, 13 L. Ed. 2d 614.

[3] One appellant in the Hill cases, Edward Ray, was also indicted for aggravated assault and battery.

exercising or engaging in certain specifically enumerated federally protected activities. From even a cursory reading of this law it is obvious that it would be the aggrieved party who would take affirmative action against the person who interfered with them through either a federal or state prosecution and not vice-versa as appellants apparently read it. Title 18 § 245 states in part:

> (a)(1). Nothing in this section shall be construed as indicating an intent on the part of Congress to prevent any State, any possession or Commonwealth of the United States, or the District of Columbia, from exercising jurisdiction over any offense over which it would have jurisdiction in the absence of this section, nor shall anything in this section be construed as depriving State and local law enforcement authorities of responsibility for prosecuting acts that may be violations of this section and that are violations of State and local law. No prosecution of any offense described in this section shall be undertaken by the United States except upon the certification in writing of the Attorney General or the Deputy Attorney General that in his judgment a prosecution by the United States is in the public interest and necessary to secure substantial justice, which function of certification may not be delegated.[4]

Title 18 § 245 of the U. S. Code simply makes certain acts subject to prosecution by the United States Government, which previously were not subject to federal prosecution. Title 18 § 245, however, does not provide a basis for removal under Title 42 § 1443 of the U. S. Code, independently or by attempting to read it into Title 42 §§ 2000(d) and 2000(e)-2 of the U. S. Code.

The legislative history of Title 17 § 245 supports this position unequivocally. The purpose and scope of section 245 is set forth in the 1968 U. S. Congressional and Ad-

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[4] See also Sec. 245(c) of 18 U. S. C

ministrative News, p. 1837. This section was designed to deter and punish interference by force or threat of force with activities protected by the federal law or the Constitution and specifically set out in the bill. It was written to bolster several other penal sections of the federal law dealing with civil rights activities. The victim, to seek redress through either the state or federal courts, must have participated or attempted to participate in a protected activity and the defendant's act must have been motivated by the race, color, religion or national origin of the victim. Again, nowhere does section 245 provide insulation from state prosecution for inciting to riot.

If Petitioners believe they fall within the purview of section 245 for the events that took place on August 26, 1969, they may certainly seek to redress their grievances under Section 245 and against those who they feel interfered with any federally protected activities that they might have engaged in at the time of their arrest. The Petitioners cannot however subvert the meaning of this law by saying that it is a defense against state prosecution for inciting to riot and that it provides a basis for removal, for there is no way this section could be so construed.

It is the Commonwealth's contention that the instant case is controlled by the decision of the Supreme Court of the United States in *Greenwood v. Peacock, supra*, where the factual circumstances were directly parallel to those involved in the present appeal. In Greenwood, the appellants were members of a civil rights group engaged in a drive to encourage negro voter registration in the City of Greenwood, Mississippi. During the course of that demonstration, they were arrested for obstructing the public streets, disturbing the peace, parading without a license,

assault and battery and inciting to riot. This Honorable Court held that the appellants failed to state a cause for removal because they relied principally upon general constitutional rights, rather than federal equal rights expressed in terms of racial equality and they did not rely on a federal right which insulated them from prosecution for the crimes charged against them in that case. The Court stated that the provisions of § 1443(1) did not operate to work a wholesale dislocation of the historic relationship between the state and federal courts in the administration of the criminal law[5] and, in this regard, stated at 384 U. S. 833:

> For if the individual petitioners should prevail in their interpretation of § 1443(1), then every criminal case in every court of every state—on any charge from a five dollar misdemeanor to first degree murder—would be removable to a federal court upon a petition alleging (1) that the defendant was being prosecuted because of his race and that he was completely innocent of the charge brought against him or (2) that he would be unable to obtain a fair trial in the state court.

It is respondent's contention as the Circuit Court of Appeals agreed that the strict criteria set forth in *Georgia v. Rachel, supra,* and the application of that criteria to the similar factual situation in *Greenwood v. Peacock, supra,* by this Honorable Court, must be controlling in the instant case and the order of the District Court affirmed.

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[5] In this connection this Honorable Court has recently enunciated similar policies dealing with the question of federal jurisdiction over state prosecutions in the following cases: *Younger v. Harris,* 401 U. S. 37 (1971); *Boyle v. Landry,* 401 U. S. 77 (1971); *Samuels v. Mackell,* 401 U. S. 66 (1971); *Perez v. Ledesma,* 401 U. S. 82 (1971); *Dyson v. Stein,* 401 U. S. 200 (1971); *Byrne v. Karalexis,* 401 U. S. 216 (1971).

III. Appellants must also show that the alleged denial of their equal civil rights is derived from a constitutional provision or statute of the state.

Assuming, *arguendo,* however, that petitioners have sufficiently stated a specific equal right sufficient to bring them within the strict criteria required under § 1443(1), petitioners next allege that they are not required to demonstrate that the denial of those rights in the state tribunal is derived from a constitutional provision or statute of the Commonwealth. In *Georgia v. Rachel, supra,* this Honorable Court enunciated and accepted the doctrine of earlier cases, *Strauder v. West Virginia,* 100 U. S. 303, 25 L. Ed. 664 (1880) and *Commonwealth of Virginia v. Rieves,* 100 U. S. 313, 25 L. Ed. 667 (1880), that removal under § 1443(1) and earlier removal statutes is warranted only if it can be predicted by reference of a law of general application that the defendant will be denied or cannot enforce the specified federal rights in the State Courts. This Court is *Rachel* noted that the Strauder-Rieves doctrine served two purposes. First, it insured that removal would be available only in cases where the predicted denial appeared with relative clarity prior to trial and secondly, it insured that the task of prediction would not involve a detailed analysis by the federal judge of the likely disposition of particular federal claims by particular State Courts. The only exception to this doctrine as recognized by the Court in *Rachel* involved the situation where an express state statute or constitutional provisions, even though not discriminatory on its face, was enforced in such a manner as to provide an equivalent basis for showing an equally firm prediction that the defendant would be denied or could not enforce the specified federal rights in the State Court. This was the circumstance in *Rachel* where the appellants

had been charged with the violation of a Georgia criminal trespass statute for refusing to leave a public restaurant, which right was protected by the public accommodations Section of the Civil Rights Act of 1964. However, in the instant case the criminal prosecutions by the Commonwealth against the Petitioners for inciting to riot is a common law offense. *Commonwealth v. Albert,* 169 Pa. Superior Ct. 318, 82 A. 2d 695 (1955).

The Respondent contends that there is therefore no state statutory or constitutional law as required by the *Strauder-Rieves* doctrine or is there an express statutory provision as would be required in applying the exception noted in the *Rachel* case. It should therefore be determined that in order for Petitioner's petition for removal to be sustained under the requirements of § 1443(1) they must show an express statute or constitutional provision or some continuous course of conduct of the state denying them their right to enforce their alleged civil rights in the state tribunal. Such a determination in the instant circumstances was not alleged on the Petition and in fact and cannot be made.

IV. There is no basis to predict with relative clarity that appellants cannot enforce their alleged affirmative federal equal civil rights in the courts of the Commonwealth of Pennsylvania.

Again, assuming *arguendo*, that the petitioners have alleged a sufficiently specific federal statute and are not required to show that the denial of the rights granted thereby are predicated upon an express statutory or constitutional law of the state or a continuous course of conduct by the state the petitioners finally allege that on the basis of the allegations of their petition for removal it can

be predicted with relative clarity that they cannot enforce such equal civil rights in the Courts of the Commonwealth of Pennsylvania. They further allege that they are entitled to have this case remanded to the Federal District Court for an evidentiary hearing. The respondent contends that these conclusions are totally without merit.

The gravamen of petitioners' contention appears to be that the only reason they were arrested and indicted on the charge of Inciting to Riot was because they were engaged in a civil rights protest march. Appellants' rationale then asserts that since this is the case they will be denied a fair and full hearing of the charges in the State Courts and be "chilled" in further prosecution of their civil rights activities.

The respondent contends, however, that, even assuming such broad and baseless accusations could be attributed some presumed degree of credibility, it would still not support a basis for removal under § 1443(1). As had been clearly been pointed out in the decision in *Greenwood v. Peacock, supra,* at 384 U. S. 827, 828:

> It is not enough to support removal under § 1443(1) to allege or show that the defendants' equal civil rights have been illegally or corruptly denied by state administrative officials in advance of trial, that the charges against the defendant are false, or that the defendant is unable to obtain a fair trial in a particular state court. The motives of the officers bringing the charges may be corrupt but that does not show that the state trial court will find the defendant guilty if he is innocent, or that in any other manner the defendant will be "denied or cannot enforce in the courts" of the state any right under federal law providing for equal civil rights. The civil rights removal statute does not require and does not permit judges of the federal courts to put their brethren of the state judiciary on

> trial. Under § 1443(1) the vindication of the defendant's federal rights is left to the state courts except in the rare situations where it can be clearly predicted by reason of the operation of a pervasive and explicit state or federal law that those rights will inevitably be denied by the very act of bringing the defendant to trial in the state court.

It is the respondent's position that under the present circumstances such an affirmative prediction has not been shown and in fact cannot be made in the instant case, and therefore, petitioners' contention must be dismissed.

Petitioners claim that the jury selection statute applicable to Allegheny County is unconstitutional as support for their contention that there is a basis for predicting that their equal civil rights will not be enforced in the State Court is not meritorious. The jury selection statute for Pennsylvania provides that juries shall be selected from lists "taxables" on the County rolls. Taxables include owners of real estate, property owners and wage earners. Petitioners' theory, succinctly stated is that since Negroes are less likely to be taxables, proportionately fewer Negroes will be selected for jury services. However, as the Circuit Court of Appeals noted the jury selection statute is constitutional on its face, since there is no provision for discrimination along racial lines nor have the Petitioners even shown that such alleged discrimination exists in practice. Any such allegation is without foundation and is based on fanciful speculation. *Alvin Clark v. Henry Ellenbogen, Michael R. Stabile and Ralph E. Ord, Jury Commissioners of Allegheny County, Pennsylvania,* 319 F. Supp. 623 (W. D. Pa. 1970)

V. Petitioners are not entitled to an evidentiary hearing having failed to state a case for removal to the Federal Courts.

Finally, petitioners' contention that an evidentiary hearing on the merits of the removal petition is required is likewise without merit. An evidentiary hearing on a petition for removal comes into question only when the petition has stated a proper cause for removal. Since it was shown above that the petitioners failed, on the face of their Petition, to state a proper cause for removal, under Title 28 § 1443 an issue concerning an evidentiary hearing becomes moot. The petitioners in the instant case, failing to state a proper cause for removal were not required to be given an evidentiary hearing by the District Court. A determination by the District Court, upon the sufficiency of petitioners' removal action on the oral arguments and briefs of counsel was appropriate here. Furthermore, petitioners' view of the extent of any evidentiary hearing if held, is in doubt. To accept petitioners' view on this point, would permit them to do indirectly what they could not do directly, *i.e.*, have a federal trial on the merits without meeting the qualifications of removal from state jurisdiction expressed by this Honorable Court in *Georgia v. Rachel, supra,* and *City of Greenwood v. Peacock, supra.* Even in the *Rachel* case and *Walker v. State of Georgia,* 417 F. 2d 1 (5th Cir. 1969), which petitioners rely upon so heavily, it is important to note that the appellants' Petitions for Removal relied on the public accommodations section of the Civil Rights Act of 1964 which has specific preemptive provisions connected with it. (See Title 42 § 2000(a)-2 of the U. S. Code and *Hamm v. City of Rock Hill, supra.*) This reliance on the public accommodations section of the Civil Rights Act of 1964 was also present in *Wyche v.*

State of Louisiana, 394 F. 2d 927 (5th Cir. 1966), *Achtenberg v. State of Mississippi,* 393 F. 2d 468 (5th CA 1966) and *Wyche v. Hester,* 431 F. 2d 791 (5th CA 1970), cited by petitioners for the proposition that an evidentiary hearing is required in all removal cases under 42 USCA § 1443(1). In *Whatley v. City of Vidalia,* 399 F. 2d 527 (5th CA 1968), the petitioners relied on specific preemptive legislation under the Voting Rights Act of 1965 (§ 1971(b), 42 U. S. C.). All other cases cited by petitioners in support of this proposition were pre-*Rachel* and *Peacock* cases or cases decided while *Rachel* and *Peacock* were pending in this Honorable Court. At that time the Fifth Circuit uniformly held in these cases that the well-plead Petition was the key to removal, however, this is before the *Rachel* court enunciated its doctrine relating to the criteria for removal under 28 U. S. C. A. 1443(1).

Conclusion

For the foregoing reasons, Certiorari should be refused.

Respectfully submitted,

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